Nor can it be alleged that the accused is the occupier of every stall which his company sublets, and I cannot find that the prosecution alleged that the whole area of the New World was a common gaming house because a game of darts was being illegally carried on in one of the stalls. The prosecution no doubt hesitated to put forward a contention which would give rise to the presumption under s. 6 sub-s. 2 of the Common Gaming Houses Ordinance. If the New World were a common gaming house every single visitor however innocent, would be presumed to have been playing therein until the contrary was proved, and be liable to a fine of $25.00.

The learned Magistrate seems to have held that the accused was not the occupier of the stall in question and accordingly acquitted him of the charges under s. 4(a) and 4(c), but proceeded with the charge under s. 4(b). The charge under s. 4(b) was however never amended so as to charge the accused as "owner" and not "occupier" and the accused was for this reason entitled to an acquittal on this charge also. In the absence of any amendment it was not permissible to argue on the appeal that the accused might be liable as owner. It is true that certain portions of the written judgment appear to indicate that the learned Magistrate was considering the case as if an amendment had in fact been made. As however that was not the case, his observations must be treated as irrelevant. It is certainly not competent for an appellate Court to convict an accused person on a charge different to that upon which he has been tried and acquitted. The powers of the Court in a case of an acquittal are given by s. 310(a) of the Criminal Procedure Code. The power to alter the finding given by s. 310(b) (ii) only applies when the appeal is against a conviction. It would clearly be an injustice to an accused person to convict him on a charge which he has not been called upon to meet.

The record of acquittal on all the charges preferred will therefore be confirmed, but the appeal will be allowed to the extent that I direct the accused to be retried as owner under s. 4(b) of the Ordinance.

Order for retrial.

[APPELLATE CRIMINAL JURISDICTION]
TERRELL, Ag. C.J.
December 5, 1940.

LATIP BIN AHMAD & ORS. v. REX.

[SINGAPORE MAGISTRATE'S APPEAL
No. 117 of 1940]

Penal Code ss. 146, 147 and 148—Criminal Procedure Code ss. 168 and 178.

A person charged with a major offence under the Penal Code may be convicted of a minor offence of the same character without being specifically charged therewith. It is not necessary that an alteration in the charge should be read out and explained to the accused.

Five persons were originally charged with rioting and two were acquitted. The remaining three were convicted of rioting. They did not themselves constitute an unlawful assembly within the meaning of s. 146 of the Penal Code and contended that they could not be convicted of rioting.

Held, that as there was ample evidence that the disturbance was created by a number of persons far in excess of five the fact that only three had been sufficiently identified did not prevent those three from being convicted of an offence under s. 147.

MAGISTRATE'S APPEAL.

First accused in person.

A. J. Braga for second accused.

E. M. Tampoe Phillips for third accused.

E. N. Griffith-Jones (Crown Counsel) for the Crown.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—Two points of law were urged on behalf of the appellants.

As regards No. 1 accused, it was submitted that he was charged under s. 148 of the Penal Code (rioting armed with a deadly weapon), but was convicted under s. 147 (simple rioting). Mr. Braga relied on s. 168 of the Criminal Procedure Code which provides that any alteration in the charge should be read and explained to the accused. But it is clear that under s. 178 an accused person may be convicted of a minor offence of the same character without being charged. A person charged with murder may be convicted of culpable homicide not amounting to murder, or of voluntarily causing grievous hurt, without being specifically charged. There is accordingly no substance in this objection.

As regards all three accused, it was submitted that, as of the five persons originally charged two had been acquitted, the remaining three did not constitute an "unlawful assembly" within the meaning of s. 146 of the Penal Code, and could not accordingly be convicted of rioting. This would be a valid argument if the three appellants were the only people who took part in the disturbance. There was, however, ample evidence that the complainants were attacked by a number of people far in excess of five, and the fact that only three have been sufficiently identified does not prevent these three from being convicted of an offence under s. 147.

On the facts of the case generally the learned District Judge, after a careful consideration of all the evidence, accepted the story of the prosecution, and considered the stories of the appellants to be incredible, and I see no reason to differ from his conclusions.

The appeals are accordingly dismissed and the sentences on Nos. 1 and 3 confirmed. The second accused Hashim Ahmad Angullia was the moving spirit in collecting a gang to beat up the complainants. In view of his special activities and his two previous convictions his sentence is increased to six months rigorous imprisonment, and a fine of $100.00 or two months rigorous imprisonment if the fine is not paid.

Appeal dismissed and sentence on second accused enhanced.

Solicitor for second accused—*A. J. Braga.*

Solicitor for third accused—*E. M. Tampoe Phillips.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

December 6, 1940.

IN RE SHAIK ABDULLAH BIN AHMAD BIN ALI AL TWAY BASALAMAH DECEASED.

[SINGAPORE ORIGINATING MOTION No. 9 of 1940]

Rules of the Supreme Court 1934 O. LIV r. 26—Probate and Administration Ordinance s. 31—Revocation of grant of probate—Court's discretion.

Under s. 31 of the Probate and Administration Ordinance the Court may revoke a grant of probate but the Court has a discretion and will not lightly revoke an appointment of an executor who has had the testator's confidence. In a case where fifteen years had elapsed since the death of the testator the Court assumed (in the absence of evidence to the contrary) that the administration had long since been completed and that an executor and trustee appointed by the Will was then functioning in the latter capacity only; and so there was no ground for revocation of probate.

ADJOURNED ORIGINATING MOTION.

R. L. Eber for applicant.

John Laycock for respondents.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—This is a motion to revoke the probate of the will and codicil of the testator which was granted to the respondent on the 18th November, 1925.

By his will and codicil the testator appointed the respondent, who was his brother, executor and trustee, and declared certain trusts of his immovable property in Singapore until the expiration of the period of 21 years from the death of the survivor of his children. Pending the period of distribution the trustee was to divide the rents as therein provided. There is no allegation that these trusts have not been faithfully carried out.

By clause 6 of his codicil the testator directed as follows:—

> "If my brother Ally bin Ahmad bin Ali al Tway Basalamah should not be living at the time of my death or should decline or be incapable to act as my Executor and Trustee of my said will, I declare my son Shaik Abubakar bin Abdullah bin Ahmad al Tway my Executor and Trustee, and failing him, my next eldest son living at time of my death."

Shaik Abubakar, the testator's eldest son, predeceased him, and the next in succession is the present applicant.

It appears that the respondent having administered the estate for nine years, left for Arabia in June 1934 and has not returned. It is stated in the applicant's affidavit and not denied, that he has no intention of returning. Before leaving Singapore he gave a joint and several Power of Attorney in favour of Shaik Ali bin Awath al Tway and the applicant . This Power of Attorney is general in its terms and makes no special reference to the estate of the above named testator. The Power of Attorney is not such a Power of Attorney as is contemplated by s. 27 of the Trustees Ordinance (Cap. 59), but presumably it has so far proved adequate for the purpose of the collection of the rents of the properties which are subject to the trusts of the will and codicil.

The applicant asks the Court to revoke the grant of probate and to make a fresh grant in the applicant's favour on the ground that the respondent having left the country is "incapable of acting as Executor".

I do not say that the Court has no jurisdiction under s. 31 of the Probate and Administration Ordinance to revoke even a grant of probate, but in the words of the section such revocation must be "for sufficient cause", and the Court clearly has a discretion. The jurisdiction might well be exercised if a sole executor had become insane before he had fully administered the estate, and there may be other cases in which a revocation would be desirable. In the present case, however, there is no suggestion of maladministration and the Court will not lightly revoke the appointment of an executor who had the testator's confidence. A fatal objection is that it is now 15 years since the testator died and, in the absence of evidence